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Idaho Board of Dentistry Guidance Letter Commercial Advertising

March 1, 2008

The Board of Dentistry ("Board") has become aware of a growing number of advertising issues involving Idaho dentists that have been brought about in part by the ease by which web-based advertising can be developed, as well as some confusion about commercial advertising in general and commercial advertising of dental services in particular. Pursuant to the Board's direction, this document is intended to provide guidance to Idaho's licensed dentists and hygienists to help them understand existing statutes and rules relative to these matters, and to help them avoid circumstances involving inappropriate advertising that could bring into question their compliance with the requirements of the Idaho Dental Practice Act set forth at Idaho Code, Title 54, Chapter 9.

The purpose of the Dental Practice Act is set forth in Idaho Code § 54-900 as follows: "[r]ecognizing that the practice of dentistry and dental hygiene is a privilege granted by the state of Idaho and is not a natural right of individuals, the purpose of this chapter is to assure the public health, safety and welfare in the state by the licensure and regulation of dentists and dental hygienists." The Idaho Legislature conferred upon the Board the power and duty to investigate, on its own motion or upon receiving a complaint, all matters pertaining to the practice of dentistry and dental hygiene. Idaho Code § 54-912.

In 2004, the Idaho Legislature revised a number of statutes pertaining to commercial advertising. The Board also amended its rules to address advertising issues. These statutes and rules have been in effect for over three (3) years, but there appears to be some confusion among licensees about the interpretation and application of these statutes and rules. Questions have also been posed to the Board and/or its staff regarding the effect the First Amendment to the United States Constitution, sometimes referred to as the "Free Speech Clause," has on the Board's ability to regulate commercial advertising.

An "advertisement" is defined as:

any public communication, made in any form or manner whatsoever, about a licensee's professional services or qualifications for the purpose of soliciting business. "Advertising" or "advertise" shall mean holding out, broadcasting, mailing, publishing, transmitting, announcing, distributing or otherwise disseminating any advertisement, whether directly or indirectly through the efforts of another person or entity. Any sign soliciting business, whether at the location of the dental practice or otherwise, shall be considered as an advertisement. A licensee who engages or authorizes another person or entity to advertise for or on the licensee's behalf is responsible for the content of the

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advertisement unless the licensee can prove that the content of the advertisement was contrary to the licensee's specific directions.

IDAPA 19.01.01.046(01).

The Idaho Legislature determined that the advertising can subject a dentist to disciplinary action as set forth below (a break in statutory continuity is identified by asterisks):

The board may refuse to issue or renew a dental license, or may revoke, suspend, place on probation, reprimand or take other disciplinary action with respect to a dental license as the board may deem proper, including administrative penalties not to exceed ten thousand dollars (\$10,000) per violation and assessment of the costs of disciplinary proceedings in the event a dentist shall:

* * *

(4)(a) Make, or cause to be made, or assist in making, any fraudulent, false, or misleading statement as to his own, or an employee's, associate's, or other dentist's or dental hygienist's skill or lack of skill, or method of practice; or

(b) Claim to practice dentistry without causing pain; or

(c) Claim superiority over other dentists; or

(d) Publish, advertise, or circulate reports, letters, certificates, endorsements, or evidence of cures or corrections of dental conditions by such dentist, his employee or associate by reason of his or their skill, experience, or ability or of his or their use of any system, method, technique, device, drug, medicine, material, manipulation or machine; or

(e) Advertise the use of, or use, any system, method, technique, device, drug, medicine, material or machine, which is either falsely advertised or misnamed; or

* * *

(8) Engage in unprofessional, unethical or immoral conduct, as defined by board rules; or

(9) Advertise in such way as to deceive or defraud, or probably deceive or defraud, the public or patrons; or

* * *

(13) Falsely identify himself to the public as a specialist in a specialty area of dentistry as defined by rule.

Idaho Code § 54-924.

Although Idaho Code § 54-924 speaks in terms of dentists, Idaho Code § 54-925 states that dental hygienists may be disciplined for committing any of the prohibited actions set forth in Idaho Code § 54-924.

Additionally, the Board has the authority to prohibit the commercial advertising of a licensee that is false, fraudulent, deceptive, or inherently misleading. These types of advertisements enjoy no protection under the First Amendment. The Board's rules address advertising. A licensee is obligated to comply with both state statutes and Board rules. The Board is urging all licensed dentists and hygienists to review all provisions of Rule 46 in their entirety. The rule begins by noting:

Dentists and dental hygienists licensed to practice in Idaho may advertise in any medium or by other form of public communication so long as any such advertising is not **false, deceptive, misleading or not readily subject to verification**. In addition to any other applicable grounds, a violation of this advertising rule shall constitute and be considered as unethical and unprofessional conduct pursuant to the Idaho Dental Practice Act and this chapter.

IDAPA 19.01.01.046 (emphasis added).

Rule 46(02) specifically provides that a licensee shall not advertise in any form or manner which is "false, misleading or deceptive to the public or which is not readily susceptible to verification." The Board has determined by rule that **the following advertising is false, deceptive, not readily subject to verification, or inherently misleading**:

- a. Makes a material misrepresentation of fact or omits a material fact;
- b. Makes a representation likely to create an unjustified expectation about the results of a dental procedure;
- c. Compares a licensee's services with another licensee's services unless the comparison can be factually substantiated;
- d. Makes a representation that is misleading as to the credentials, education, or the licensing status of a licensee;
- e. Represents that the benefits of a dental insurance plan will be accepted as full payment when deductibles or copayments are required;
- f. Makes a representation that is intended to take advantage of the fears or emotions of a particularly susceptible type of patient; and
- g. Refers to benefits of dental procedures or products that involve significant risks without including realistic assessments of the safety and efficacy of those procedures or products.

IDAPA 19.01.01.046(2).

The Board has reviewed the statutes, case law from Idaho and around the country, and determined that the following words and phrases are additional examples of inherently misleading advertising:

- Painless or pain free dentistry
- Total Comfort
- “Quality Dentistry”
- Offer to correct/perfect consumer’s smile or correct/perfect consumer’s dental condition
- The term “board certified” when used to describe a certification that does not meet the statutory criteria.
- “Free” services without explaining the purchase of additional services is required to obtain the “free” services.

Additionally, the Board “recognizes and licenses the following specialty areas of dental practice: Dental Public Health; Endodontics; Oral and Maxillofacial Pathology; Oral and Maxillofacial Radiology; Oral and Maxillofacial Surgery; Orthodontics; Pediatric Dentistry; Periodontics; and Prosthodontics.” IDAPA 19.01.01.046(3). The following rule, which was amended in 2005, relates specifically to the advertising of specialty services:

a. An advertisement shall not state that a licensee is a specialist, or specializes in a recognized specialty area of dental practice, or limits his practice to any recognized specialty area of dental practice unless the licensee has been issued a license or certification in that specialty area of dental practice by the Board. Use of words or terms in advertisements such as "Endodontist," "Pedodontist," "Pediatric Dentist," "Periodontist," "Prosthodontist," "Orthodontist," "Oral and Maxillofacial Pathologist," "Oral Pathologist," "Oral and Maxillofacial Radiologist," "Oral Radiologist," "Oral and Maxillofacial Surgeon," "Oral Surgeon," "Specialist," "Board Certified," "Diplomate," "Practice Limited To," and "Limited To Specialty Of" shall be prima facie evidence that the licensee is announcing or holding himself out to the public as a specialist or that the licensee specializes in a recognized area of dental practice.

b. A licensee who has not been licensed or certified by the Board in a recognized specialty area of dental practice may advertise as being qualified in a recognized specialty area of dental practice so long as each such advertisement, regardless of form, contains a prominent disclaimer that the licensee is "licensed as a general dentist" or that the specialty services "will be provided by a general dentist." Any disclaimer in a written advertisement shall be in the same font style and size as that in the listing of the specialty area.

c. A licensee shall not advertise as being a specialist in or as specializing in any area of dental practice which is not a Board recognized and licensed specialty area unless the advertisement, regardless of form, contains a prominent disclaimer that the advertised area of dental practice is not recognized as a specialty area of dental practice by the Idaho Board of Dentistry. Any disclaimer in a written advertisement shall be in the same font style and size as that in the listing of the specialty area.

IDAPA 19.01.01.046(3)(a-c).

If the advertising is not false, fraudulent, inherently misleading, deceptive, or not readily subject to verification, that advertising may still be **potentially misleading**. Under the First

Amendment to the United States Constitution, the Board has the authority to regulate potentially misleading advertising if the restriction on the advertising required by the Board advances the State's interest in narrowly tailored fashion.

The Board has examined several court decisions addressing potentially misleading advertising. For example, in one case the court determined that a state has an interest in ensuring that if a licensed general dentist performs services that would be performed by a licensed specialist, the general dentist can be required to include a disclaimer that services are performed by a general dentist. One court noted that disclaimers are "effective safeguards to dissipate 'consumer confusion or deception' and 'advances the State's interest in a circumscribed manner, yet causes [the licensed dentist] no outweighing harm.'" Typically, the Board will consider whether a disclaimer may be used to minimize the potential for misleading consumers.

The Board and its staff have an obligation to review and evaluate every complaint and/or advertisement submitted to them, whether that submission is anonymous, by a dentist, or by a member of the public. Pursuant to Board Rule 46, if the advertising consists of or contains verbal communication to the public by television, radio, or other means, the advertisement shall be prerecorded and a recording of the advertisement must be retained by licensee for two (2) years. Upon receipt of a written request from the Board, a licensee shall provide any such recorded advertisement to the Board within five (5) working days. If you do not routinely keep copies of your advertising on file, you should do so to enable you to comply with the rule if a request is issued by the Board.

The Board will consider a number of factors when evaluating the advertising, including: whether the advertisement includes words or phrases that have been prohibited by statute and/or Board rule, whether the advertisement includes words or phrases that are inherently misleading, false, fraudulent, or deceptive, whether the advertisement is potentially misleading, whether the advertisement includes a proper disclaimer, the medium of the advertising (e.g. internet, print, radio, and/or television), the licensee's attempts to bring himself or herself into compliance with the statutes and rules, and the licensee's history, including whether the licensee has previously been found by the Board to have violated the advertising rules and/or statutes. These considerations apply to all licensees and all advertising. Additionally, each day an unlawful advertisement is published or broadcast it can constitute a separate violation.

This guidance letter provides the Board's interpretation of the existing statutes and rules applicable to advertising. The Board's staff will utilize this guidance letter in future matters to evaluate complaints that have been filed with the Board, to determine whether said complaint(s) need further review by the members of the Board and/or the Board's legal counsel. The failure of any licensed dentist to comply with the statutes and/or rules as interpreted by the Board pursuant to this guidance letter could subject the licensee to enforcement and/or disciplinary action.

Sincerely,

Arthur R. Sacks
Executive Director